Supreme Court, U.S.
FILED
No. 931644 APR 11 1994
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IN THE

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1993

JAMES ROBERT BURCHARD and JUNE P. BURCHARD,
Petitioners,

v.

H. LAWRENCE GARRETT, III, Secretary, Department of the Navy,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JAMES R. BURCHARD,
appearing pro se
996 Olney Street East
Port Orchard, WA 98366
(206) 876-3281

28 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States Court of Appeals can ignore the thrust of this Court's decisions in Houston v. Lack, 487 U.S. 266 (1988) and Parissi v. Telechron , 349 U.S. 46 (1955) and decide that the filing requirement of a Notice of Appeal within the purview of Fed. R. App. P 3 and 4 is the date that it is formally "filed" by the clerk of the District Court?

2.Whether the United States Court of Appeals can ignore the thrust of the last sentence of Fed. R. App. 4 (a) (1) , ..."If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date on which it was received and transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date so noted"..., and decide that the filing requirement of a Notice of Appeal is the date that it is formally "filed" by the clerk of the District Court?

PARTIES TO THE PROCEEDING

All of the parties in the United States Court of Appeals for the Ninth Circuit are listed in the caption.

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No.____

IN THE

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1993

JAMES ROBERT BURCHARD and JUNE P. BURCHARD,
Petitioners,

v.

H. LAWRENCE GARRETT, III, Secretary, Department of the Navy,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, James Burchard and June P. Burchard, request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this action on December 1, 1993.

OPINIONS BELOW

The Memorandum Opinion and Judgment of the United States Court of Appeals for the Ninth Circuit (Appendix F, 6a) has been designated "Not For Publication" by the court. The crux of the decision: "The government contends we lack jurisdiction because the notice of appeal is untimely. We agree and dismiss the appeal."

The Order Granting Defendant's Motion For Summary Judgment of the District Court (Appendix H, 11a) is reported at ____F. Supp._____.

JURISDICTION

The Memorandum Opinion and Judgment of the United States Court of Appeals for the Ninth Circuit was entered on December 1, 1993 (Appendix F, 6a). Petitioner timely filed a Petition for Rehearing and Suggestion for Rehearing En Banc. The court below entered an order (Appendix G, 10a) denying the Petition for Rehearing on January 11, 1994. This Petition for Certiorari is filed within ninety (90) days of that date. The jurisdiction of this Court to review the judgment on Petition for Certiorari rests upon Section 1254 (1) of the Judicial Code [28 U.S.C. § 1254 (1)].

STATUTE INVOLVED

This case involves Federal Rule of Appellate Procedure 4 (a) (1), which provides as follows:

Rule 4. Appeal as of Right- When Taken.

(a) Appeals in Civil Cases.

(1) In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of the entry of the judg-

ment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date on which it was received and transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date so noted.

STATEMENT OF CASE

On February 22, 1993 the District Court entered summary judgment for the Secretary of the Department of Navy (Appendix H, 11a). On April 13, 1993 the Petitioners sent their Notice of Appeal (Appendix A, 1a) to the Clerk of the District Court by certified mail. The return receipt (Appendix B, 2a and Appendix C,3a) shows that an employee of the office of the Clerk received the Notice of Appeal on April 14, 1993. On April 16, 1993 the Petitioners sent their Notice of Appeal to the Clerk of the Court of Appeals by certified mail. The return receipt (Appendix D, 4a and Appendix E, 5a) shows that the Clerk of the Ninth Court of Appeals received the Notice of Appeal on April 19, 1993. The last day to file the Notice of Appeal was April 23, 1993. Fed. R. App. P. 4 (a) (1).

On December 1, 1993 the Court of Appeals for the Ninth Circuit filed its Memorandum Opinion and Judgment (Appendix F, 6a). The crux of the decision: "The government contends we lack jurisdiction because the notice of appeal is untimely. We agree and dismiss the appeal."

A Petition for Rehearing was denied by the court below on January 11, 1994 (Appendix G, 10a).

REASONS FOR GRANTING WRIT

I.

Notice of Appeal is timely filed if received by the clerk of the District Court within the applicable period specified in Fed. R. App. P. 4 (a) (1).

In Houston v. Lack, 487 U.S. 266 (1988), this Court, speaking through Justice Brennan, stated at page 273:

> Respondent concedes that receipt of a notice of appeal by the clerk of the district court suffices to meet the "filing" requirement under Rules 3 and 4 even though the notice has not yet been formally "filed" by the clerk of the court. Parissi v.Telechron, Inc. 349 U.S. 46, 47, 99 l Ed 867, 75 S Ct 577 (1955); see also, e.g., Deloney v. Estelle, 661F2d 1061, 1062-1063 (CA5 1981); Aldabe v. Aldabe, 616 F2d 1089, 1091 (CA9 1980);United States v. Solly, 545 F2d 874, n876 (Ca 3 1976) But the rationale for concluding that receipt constitutes filing in the ordinary civil case is that the appellant has no control over the delays between the court clerk's receipt and formal filing of the notice. See, e.g.., Deloney, supra, at 1063; Aldabe, supra, at 1091; Solly, supra, at 876.

In Reinsurance Co. of America, Inc. v. Administratia, 808 F. 2d 1249 (7th Cir. 1987), the court started at page 1253:

> "Certified mail, return receipt requested, ...is designed...to furnish a sender of mail with proof of its delivery, and it is in return for this assurance, ...that certified mail is more costly."

The Clerk of the District Court received the Petitioners' Notice of Appeal on April 14, 1993. The certified mail return receipt (Appendix B, 2a and Appendix C, 3a) is independent third party written proof of receipt by the Clerk of the District Court. The last day to file the Notice of Appeal was April 23, 1993.

II.

Notice of Appeal is timely filed if received by the Clerk of the Court of Appeals within the applicable period specified in Fed. R. App. P. 4 (a) (1).

The pertinent portion of Fed. R. App. P. 4 (a) (1) provides:

> "If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date on which it was received and transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date so noted."

The clerk of the Court of Appeals received the Petitioners' Notice of Appeal on April 19, 1993. The certified mail return receipt (Appendix D, 4a and Appendix E, 5a) is independent third-party written proof of receipt by the clerk of the Court of Appeals. The last day to file the Notice of Appeal was April 23, 1993.

CONCLUSION

WHEREFORE, the petitioners pray that a Writ of Certiorari be granted to rectify:

1. the misapplication by the Ninth Circuit of this Court's opinions in Houston v. Lack, 487 U.S. 266 (1988) and in Parissi v. Telechron, 349 U.S. 46 (1955); and,

2. the misapplication by the Ninth Circuit of Fed. R. App. P. 4 (a) (1).

Respectfully submitted,
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Appendix

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

UNITED STATES DISTRICT COURT
OFFICE OF THE CLERK
UNITED STATES COURTHOUSE
2ND FLOOR
SEATTLE, WASHINGTON 98104

APRIL 12TH 1993

JAMES ROBERT BURCHARD
JUNE P. BURCHARD PLAINTIFF
996 OLNEY STREET EAST
PORT ORCHARD, WASHINGTON 98366
phone 206-876-3281

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF SEATTLE
AT SEATTLE

NUMBER C92-102R

ORDER GRANTING DEFENDANTS MOTION
FOR SUMMARY JUDGMENT

PLAINTIFF WISH TO APPEAL THE DECISION

PLAINTIFF DID NOT HAVE OPPORTUNITY HIS DEPOSITION, NOR PRE TRIAL, NOR MEDIATION, PLAINTIFF WAS ACTING PROSE, PLAINTIFF REPORTED PROHIBITED DISCRIMINATION, DEFENSE USED AGE DISCRIMINATION FOR COURT.

PLAINTIFF ONLY WANTED TO DEAL WITH DISCRIMINATION, NOT ANYTHING TO DO WITH MERIT PROMOTIONAL, THEREFORE THE CASE WAS TOP HEAVY WITH THE DEFENSE PAPER.

ON A PAGE ONE DOCUMENT CASE C92-102R ORDER GRANTING DEFENDANTS MOTION FOR SUMMARY JUDGMENT, U.S. DISTRICT COURT AT SEATTLE, WA PAGE ONE BACKGROUND, LINES 23, 24, 25, 26, PAGE TWO, LINES 1, 2, 3, 4, UNTRUE PLAINTIFF DID NOT HAVE OPPORTUNITY TO CHALLENGE OR ANSWER BASICALLY A BUNCH OR UNTRUE AND UNNEEDED PAPER.

THEREFORE PLAINTIFF ASKED FOR AN APPEAL.

SINCERELY
JAMES ROBERT BURCHARD
PROSE

JUNE P. BURCHARD,
WIFE

COPIES
(SEATTLE AND CALIFORNIA U.S. COURT APPEALS),

SENDER:

- Complete items 1 and/or 2 for additional services.
- Complete items 3, and 4a & b.
- Print your name and address on the reverse of this form so that we can return this card to you.
- Attach this form to the front of the mailpiece, or on the back if space does not permit.
- Write "Return Receipt Requested" on the mailpiece below the article number.
- The Return Receipt Fee will provide you the signature of the person delivered to and the date of delivery.

I also wish to receive the following services (for an extra fee):

1. ☐ Addressee's Address
2. ☐ Restricted Delivery

Consult postmaster for fee.

3. Article Addressed to:

UNITED STATES DISTRICT COURT
OFFICE OF THE CLERK
UNITED STATES COURTHOUSE
2ND FLOOR
SEATTLE, WA 98104

4a. Article Number P-886-414-746

4b. Service Type
☐ Registered ☐ Insured
☒ Certified ☐ COD
☐ Express Mail ☐ Return Receipt for Merchandise

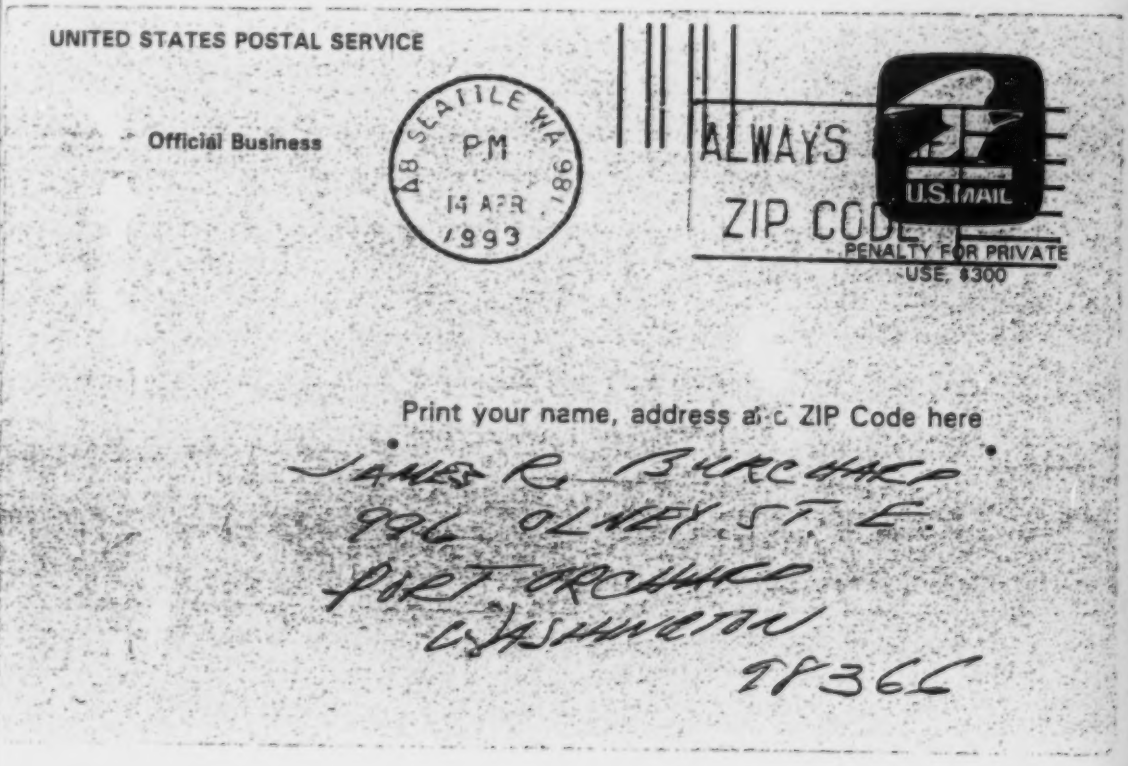
5. Signature (Addressee)

6. Signature (Agent)

7. Date of Delivery 14 APR 1993

8. Addressee's Address (Only if requested and fee is paid)

PS Form 3811, November 1990 *U.S. GPO: 1991—287-068 DOMESTIC RETURN RECEIPT


UNITED STATES POSTAL SERVICE

Official Business

AB SEATTLE WA 981
PM
14 APR
1993

ALWAYS
ZIP COD

U.S. MAIL

PENALTY FOR PRIVATE
USE, $300

Print your name, address and ZIP Code here

JAMES R. BURCHARD
996 OLNEY ST. E.
PORT ORCHARD
WASHINGTON
98366

Is your RETURN ADDRESS completed on the reverse side?

SENDER:

- Complete items 1 and/or 2 for additional services.
- Complete items 3, and 4a & b.
- Print your name and address on the reverse of this form so that we can return this card to you.
- Attach this form to the front of the mailpiece, or on the back if space does not permit.
- Write "Return Receipt Requested" on the mailpiece below the article number.
- The Return Receipt will show to whom the article was delivered and the date delivered.

I also wish to receive the following services (for an extra fee):

1. ☐ Addressee's Address
2. ☐ Restricted Delivery

Consult postmaster for fee.

3. Article Addressed to:
United States Court of appeals
Office of the Clerk
P.O. Box 19393
Spear Street
San Francisco, CA 94119-

4a. Article Number
P 886 414 776

4b. Service Type
☐ Registered ☐ Insured
☒ Certified ☐ COD
☐ Express Mail ☐ Return Receipt for Merchandise

7. Date of Delivery

5. Signature (Addressee)

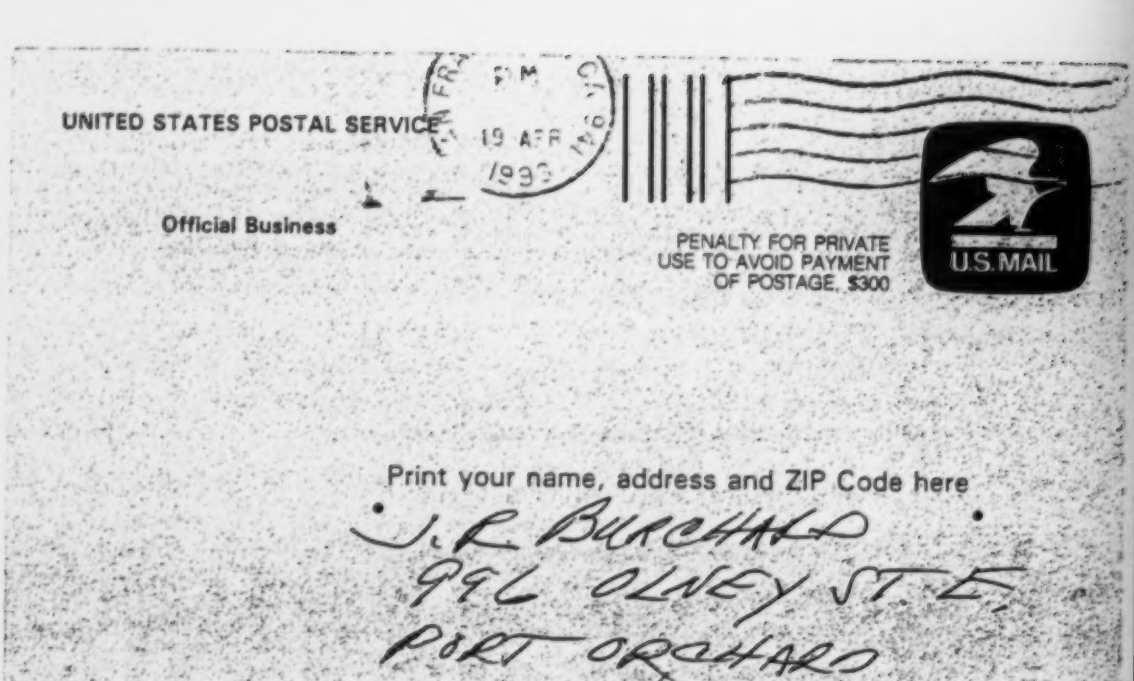
RECEIVED
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS
APR 19 1993

8. Addressee's Address (Only if requested and fee is paid)

6. Signature (Agent)

PS Form 3811, December 1991 ☆ U.S.G.P.O. 1992-307-530 DOMESTIC RETURN RECEIPT

DOCKETED


UNITED STATES POSTAL SERVICE
Official Business
PENALTY FOR PRIVATE USE TO AVOID PAYMENT OF POSTAGE, $300
U.S. MAIL
Print your name, address and ZIP Code here
J. R BURCHALD
991 OLNEY ST. E.
PORT ORCHARD
WA 98366

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 93-35425
CT/AG#: CV-92-00102-R

JAMES ROBERT BURCHARD, and; JUNE P. BURCHARD
Plaintiffs - Appellants

v.

H. LAWRENCE GARRETT, III, Secretary, Department of Navy
Defendant - Appellee

Appeal From the United States District Court for the Western District of Washington (Seattle)

ON CONSIDERATION WHEREOF,. It is now here ordered and adjudged by this Court, that the appeal in this cause be, and hereby is dismissed.

Filed and entered December 01, 1993.

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES ROBERT BURCHARD; JUNE P. BURCHARD,

Plaintiffs - Appellants,

v.

H. LAWRENCE GARRETT, III, Secretary, Department of Navy,

Defendant-Appellee.

No. 93-35425

D.C. No. CV-92-00102-R

MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
Barbara J. Rothstein, District Judge, Presiding

Submitted November 17, 1993**

Before: SCHROEDER, D.W. NELSON and THOMPSON, Circuit Judges

James Robert Burchard and June P. Burchard (the Burchards) appeal pro se the district court's summary judgment for the Secretary of the Department of the Navy in their action under Title VII, 42 U.S.C. § 2000e et seg., and the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seg. The government contends we lack jurisdiction because the notice of appeal is untimely. We agree and dismiss the appeal.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a) ; 9th Cir. R. 34-4.

A timely notice of appeal is mandatory and jurisdictional. Munden v. Ultra-Alaska Assocs., 849 F.2d 383, 386 (9th Cir. 1988). "Under Fed. R. App. P. 4(a) (1), in a matter where the United States is a party, a notice of appeal must be filed within sixty days after the date of the which is being appealed." United States v. Nutri-Cology, Inc., 982 F. 2d 394, 396 (9th Cir. 1992). The district court may extend the time for filing a notice of appeal if a party (1) moves for an extension of time no later than thirty days after the expiration of the original appeal period, and (2) makes a sufficient showing of good cause or excusable neglect for not meeting the original deadline. Fed. R. App. P. 4 (a) (5); Malone v. Avenenti, 850 F. 2d 569, 571 (9th Cir. 1988).
Where the appellant fails to seek an extension of time in the district court, we lack the authority to either grant an extension or remand to the district court for a determination regarding whether an extension was warranted. Hoag Ranches v. Stockton Production Credit Assoc., 846 F.2d 1225, 1229 (9th Cir. 1988) (order).

Here, the district court's judgment was entered on February 22, 1993. Therefore, the Burchards were required to file a notice of appeal by April 21, 1993. See Fed. R. App. P. 4 (a) (1) ; Nutri-Cology, Inc., 982 F. 2d at 396. The Burchards, however, did not file a notice of appeal until April 26, 1993. Although the Burchards' notice of appeal was not filed within the sixty-day time limit, they appear to argue that it was timely because they originally sent it by certified mail to this court on March 12, 1993. Apparently they sent the notice of appeal to the wrong address and

discovered on April 12, 1993 that it had not been received by this court or the district court. Subsequently, the Burchards mailed another notice of appeal to the district court which was received five days after the filing deadline.

Regardless of the alleged factual circumstances, because the Burchards failed to file a notice of appeal within the initial sixty-day period set forth in rule 4 (a) (1) and failed to file a motion requesting an extension of time within the thirty-day grace period set forth in rule 4 (a) (5) , we dismiss the appeal for lack of jurisdiction. See Malone, 850 F. 2d at 572-74 ; In re Hoag Ranches, 846 F. 2d at 1229.

DISMISSED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES ROBERT BURCHARD; JUNE P. BURCHARD,

Plaintiffs - Appellants,

v.

H. LAWRENCE GARRETT, III, Secretary, Department of Navy,

Defendant - Appellee.

NO. 93-35425

D.C. No. CV-92-00102-R
Western Washington
(Seattle)

ORDER

Before: SCHROEDER, D. W. NELSON, and THOMPSON, Circuit Judges

The panel has voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JAMES R. BURCHARD and JUNE P. BURCHARD, husband and wife,

Plaintiffs,

v.

H. LAWRENCE GARRETT, III, Secretary, Department of the Navy,

Defendant.

No. C92-102R
ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS MATTER comes before the court on the defendant's motion for summary judgment. Having reviewed the motion together with all documents filed in support and in opposition, and being fully advised, the court finds and rules as follows:

I. Background

Plaintiffs James and June Burchard, appearing pro se, brought this action against the Secretary of the Navy, alleging that defendant breached a settlement agreement on Mr. Burchard's claim of age discrimination. For the four years between 1977-1980, Mr. Burchard had been appointed each spring as a temporary Reactor Plant General Foreman at the Puget Sound Naval Shipyard. In the spring of 1981, Mr. Burchard was not promoted to the newly opened position of a permanent Reactor Plant General Foreman. On May 26, 1981, Mr. Burchard filed an age discrimination complaint with the Equal Employment Opportunity Commission ("EEOC") due to the failure of Puget Sound Naval

Shipyard to promote him to a permanent General Foreman.

Mr. Burchard's EEOC complaint was resolved in the settlement agreement reached on March 30, 1983 with the department of the Navy. See Declaration of Armando Morales, Exhibit 3, "Memorandum of Settlement." This settlement agreement provided that his personnel record would be altered so that his status at the time of his retirement would be as if he had been promoted to the position of a permanent Reactor Plant General Foreman. Id. The settlement agreement further provided that the "date of retirement, for the purpose of this agreement, is the date Workman's Compensation or the retirement annuity commenced, whichever is the earlier date." Id. In return, Mr. Burchard agreed to withdraw his EEOC complaint and further agreed to not bring either an administrative or civil action based on his complaint.

Pursuant to the settlement agreement, on April 5, 1983, Mr. Burchard's personnel record was changed so that through May 17, 1982, the date of his formal retirement, his pay status was listed as a permanent Reactor Plant General Foreman. Declaration of Armando Morales, ¶ 8.

The basis of Mr. Burchard's complaint in this court is that the Puget Sound Naval Shipyard has paid Mr. Burchard's compensation at rates other than were agreed to in settlement of his age discrimination claim. Specifically, Mr. Burchard alleges that the Puget Sound Naval Shipyard breached the settlement agreement by not using June 12, 1981 as his retirement date, incorrectly computing his compensation, and incorrectly processing his "buyback" of annual and sick leave.

II. DISCUSSION

A. Standard of Review.

On a motion for summary judgment, this court will look at the evidence in the light most favorable to the non-moving party, and determine whether there are any genuine issues of material fact which would require a jury or judge to resolve the parties' differing versions of the truth at trial. Sierra Club v. Penfold, 857 F. 2d 1307, 1320 (9th Cir. 1988). If the non moving party will bear

the burden of proof at trial on an essential element of its case, and that party fails to make a showing sufficient to establish a genuine dispute of fact as to that element, then summary judgment is appropriate. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

B. Statute of Limitations.

This court has jurisdiction over a settlement agreement resolving an underlying age discrimination complaint pursuant to the Age Discrimination in Employment Act ("ADEA") , 29 U.S.C. §§ 621 et seg.See Blank v. Donovan, 780 F. 2d. 808, 809-810 (9th Cir. 1986). The Ninth Circuit has held that the applicable statute of limitations for such actions is governed by 28 U.S.C. § 2401(a), which mandates a six-year limitations period for all civil actions filed against the United States. Lubniewski v. Lehman, 891 F. 2d 216, 221 (9th Cir. 1989) ("federal employee ADEA claims ...are subject to the six year catch-all statute of limitations for nontort civil claims against the United States"). Defendant contends that plaintiffs' failed to file their action in this court within this statutorily defined six-year limitations period.

Based on considerations of sovereign immunity, statutes of limitations in suits against the federal government are jurisdictional. See Diliberti v. United States, 817 F. 2d 1259, 1261 (7th Cir. 1987). The burden is on the plaintiffs to establish that the jurisdictional requirements are met. Marks v. Turnage, 680 F. Supp. 1241, 1243 (N.D. Ill. 1988) (citations omitted).

1. Accrual of the Plaintiffs' Cause of Action .

28 U.S.C. § 2401 (a) provides in relevant part that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." A cause of action "first accrues" at the time that the plaintiff began to suffer the alleged disadvantage. Walters v. Secretary of Defense, 725 F. 2d 107, 114 (D.C. Cir. 1983) (plaintiff's right of action first accrued within the meaning of section 2401 (a) when he received his less-than-honorable discharge, not when the discharge review board denied his request for an upgrade).

Defendant contends that plaintiffs' right of action first accrued when defendant took the administrative action which allegedly breached the 1983 settlement agreement. This action was taken by the Puget Sound Naval Shipyard on April 5, 1983, when Mr. Burchard's personnel record was modified to reflect that he was a Reactor Plant General Foreman when he retired. See Declaration of Armando Morales,
¶ 8. An April 5, 1983 date of first accrual would cause the statute of limitations period to run on April 5, 1989. Plaintiffs filed their action in this court on January 24, 1992.

2. Tolling the Statute of limitations Period.

Plaintiffs contend that their pursuit of administrative remedies after the alleged breach of the settlement agreement tolls the statute of limitations period. EEOC regulations provide that a complainant shall notify the EEOC of any alleged noncompliance with a settlement agreement which resolves an age discrimination complainant, "within 30 days of when the complainant knew or should have known of the alleged noncompliance." 29 C.F.R. § 1613.217 (b). The " agency," in this case the Puget Sound Naval Shipyard, then has 30 days "in which to resolve the matter and to respond to the complainant, in writing, concerning the matter." 29 C.F.R. § 1613.217 (b). This constitutes the Puget Sound Naval Shipyards's "final decision" of whether or not there was noncompliance with settlement agreement. 29 C. F. R. § 1613.217 (b).

If the employing agency has not responded to the complainant within 30 days, or "If the complainant is not satisfied with the agency's attempt to resolve the matter, the complainant may appeal to the [EEOC] for a determination as to whether the agency has complied with the terms of the settlement agreement..."

As required, Mr. Burchard notified the EEOC and the Puget sound Naval Shipyard of the alleged breach of the settle-

ment agreement. See Defendant's Exhibit 1, EEOC Appeal Decision, dated December 20, 1991, at 1. Mr. Burchard then timely appealed to the EEOC office of Review and Appeals the Puget Sound Naval Shipyard's final decision that no breach had occurred. Id. On December 20, 1991, the EEOC Office of Review and Appeals affirmed the Puget Sound Naval Shipyard's prior decision that the settlement agreement had not been breached. Id. As noted above, plaintiffs filed this action in district court shortly thereafter.

In Marks v. Turnage, 680 F. Supp. 1241, 1243 (N.D. Ill. 1988), the EEOC entered a final finding of no discrimination with respect to the plaintiff's age discrimination complaint. The plaintiff then chose to pursue an administrative appeal of this finding to the EEOC Office of Review and Appeals. Id. Approximately two and one-half years later, the EEOC denied plaintiff relief and affirmed the finding of no discrimination. The six-year statute of limitations period expired during the two and one-half years that plaintiff's EEOC appeal was pending. Id. at 1242-1244.

The court noted that plaintiff was not required to pursue her claims administratively before filing her complaint in federal court. Marks, 680 F. Supp. at 1244. Where a party is compelled to resort to administrative proceedings before initiating a federal action, that party's cause of action first accrues under 28 U.S.C. § 2401 when the administrative proceedings have been completed. Id. (citing Crown Coat Front Co. v. United States, 386 U.S. 503, 510-514 (1967)

The court held , however, that where "administrative proceedings are not required before a civil action may be brought, a cause of action first accrues when the injury occurs and suit may be brought" Marks 680 F. Supp. at 1244 (emphasis added) (citations omitted). Plaintiff's age discrimination claim was therefore found to be time-barred under 28 U.S.C. § 2401, and was dismissed due to the court's lack of subject matter jurisdiction. Id.; see also Spannus v. United States Dept. of Justice, 824 F. 2d 52, 57 (D.C. Cir. 1987) (holding that plaintiff's pursuit of permissive administrative remedies for a FIOA claim, not required for exhaustion, did not toll statute of limitations under 28 U.S.C. § 2401); Group Health, Inc. v. United States, 622 F. Supp. 753, 763 (S.D.N.Y. 1987) (plaintiff's pursuit of permissive administrative remedies

with respect to its FTCA claim did not toll statute of limitations under 28 U.S.C. § 2401); United States v. Kubrick, 444 U.S. 111, 114-115 (1979) (date of accrual for an FTCA claim is not postponed during the pendency of a separate administrative appeal).

Mr. Burchard's appeal to the EEOC Office of Review and Appeals did not change the date on which his cause of action accrued. Rather, plaintiffs' cause of action first accrued at the conclusion of the mandatory administrative proceedings. These mandatory administrative remedies consist solely of first, sending written notice to the EEOC and Puget Sound Naval Shipyard within 30 days of the April 5, 1983 administrative act which allegedly caused the breach of the settlement agreement; and, second, waiting and additional 30 days for the Puget Sound Naval Shipyard to respond in writing. See 29 C.F.R. § 1613. 271 (b).

Assuming the maximum time for pursuit of plaintiffs' mandatory administrative remedies for the purposes of this motion, or 60 days from the alleged breach, plaintiff's cause of action first accrued on June 5, 1983. This would cause the statute of limitations period to run on June 5, 1989. Plaintiffs filed their action in this court almost two and one-half years later, on January 24, 1992. Plaintiffs' complaint in these matter was therefore filed outside the six year statute of limitations dictated by 28 U.S.C. § 2401 (a), and the court lacks subject matter jurisdiction over the plaintiffs' complaint.

It is ORDERED, ADJUDGED, and DECREED that:
(1) defendant's motion for summary judgment is GRANTED;
(2) plaintiff's complaint is DISMISSED with prejudice; and,
(3) plaintiffs' motion to amend the scheduling order is STRICKEN as moot.

DATED at Seattle, Washington this 22nd day of February, 1993.

Barbara J. Rothstein
Chief United States District Judge